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In the

Supreme Court of the United States

OCTOBER TERM 1964

No. 788

STATE OF MINNESOTA, ex rel. ROGER W. JENSON,
Petitioner,

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF MINNEAPOLIS, a Municipal Corporation, and THOMAS O. KACHELMACHER, GLEN F. GALLES, JOHN F. BURMEISTER and JOHN W. PROCTOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Comes now your petitioner herein and respectfully shows the Court pursuant to Rule 23 of Rules of the Supreme Court of the United States:

(a) That the following orders and decisions were made affirming petitioner's discharge for "misconduct":

(1) "Findings of Fact" (Minneapolis Civil Service Commission dated April 17, 1962). Record below (R. p. 134)—nine copies filed herewith.

(2) "Order of Affirmance" (District Court of Minnesota (State), Fourth Judicial District) dated June 6, 1963 (R. p. 143).

(3) Decision, Supreme Court, State of Minnesota, filed July 17, 1964, ... Minn. ...., 130 N.W.2d 143 (Appendix A).

(4) Order denying Petition for Rehearing, dated October 1, 1964 (see Appendix C, cf. Appendix B).

(b) (i) Minnesota Supreme Court Decision No. 108, filed July 17, 1964.

(ii) That a petition for Rehearing was filed July 20, 1964 by petition and denied (and decision No. 108, supra, entered) on October 1, 1964.

(iii) That jurisdiction is conferred on this Court by Section 1257 of Title 28, *U.S.C.*, Subsection (3):

> "Final judgment or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari * * * where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution * * * or * * * where any title, right, privilege or immunity if specially set up or claimed under the constitution * * *."

(c) That the sole question presented for review is as follows:

Whether or not the State of Minnesota acting through its agencies and under color of statute can restrict state employees' right to free speech without constitutional restraint.

Stated another way: Does government employment deprive an American of his right to criticize that government?

Or specifically, does *Minnesota Statutes Annotated* 197.46 provide a lawful basis for abridging your petitioner's (a professional social worker) right to criticize the operation of the Minneapolis (State) Welfare Department, wherein he was a civil servant, or to report

matters of political pressure, inefficiencies, inequities and fraud in the handling of relief claims, by making such criticism "misconduct" and a lawful basis for discharge?

Or, more generally, to what degree, if any, is a governmental employee protected by the Bill of Rights and the 14th Amendment while in governmental employment?

(d) That the constitutional provisions and statutes involved are:

United States Constitution, Amendments I, (V), XIV, Section 1:

Amendment I: "Congress shall make no law * * * abridging the freedom of speech * * *."

Amendment V: "No person shall be * * * deprived of life, liberty or property without due process of law * * *."

Amendment XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minnesota Statutes Annotated 197.46:

"* * * No person holding a position in the State of Minnesota * * * (or its political subdivisions) who is an honorably discharged veteran shall be removed from such position or employment except for incompetency or misconduct * * *."

(e) The petitioner is a properly trained and qualified professional social caseworker employed in that capacity until discharged on December 8, 1961 and entitled to the

protection of *Minnesota Statutes Annotated* 197.46 (R. 134, f. 2; R. 134, f. 3; R. 111, f. 3; R. 119, f. 1). He is a member of the American Public Welfare Association and the United States Committee of International Conference of Social Workers (R. 129, f. 1). The record is overwhelmingly clear that your petitioner is an outstanding social worker (R. 80, f. 3; R. 91, f. 3; R. 93, f. 1; R. 96, f. 3; R. 97, f. 1; R. 99, f. 3; R. 100, f. 3; R. 103, f. 2; R. 106, f. 3; R. 109, f. 3; R. 110, ff. 2-3; R. 85, f. 1). Even the Administration witnesses had to agree as to his gentlemanly behavior and that he was an outstanding case worker (R. 40, f. 3; R. 64, f. 3; R. 72, f. 3; R. 77, f. 3; R. 56, f. 3; R. 35, f. 3; R. 36, f. 1). His efficiency, honesty and energy are unassailed in the record. (See R. 149, Appendix II.)

It is abundantly clear from the record and findings that your petitioner was fired for exercising his right to free speech and this was openly admitted by the key witness against your petitioner (R. 55, f. 1; R. 65, f. 3). The record is devoid of any evidence that your petitioner's criticisms were contrary to the public interest nor was there any evidence of poor judgment or professional misconduct. No welfare claimants testified (R. 98, f. 3; R. 99, ff. 1-3). Even the administration's key witness admitted your petitioner should express his opinions and further agreed everything your petitioner reported was true (R. 42, f. 3; R. 43, f. 1; R. 64, f. 1). Not one word was deleted from your petitioner's case reporting although any one of at least five or six levels above him had the authority to change it (R. 58, ff. 1-3; R. 59, f. 1).

The clear censorship imposed upon your petitioner by the public welfare administration was wrapped in the soiled paper of petty instances of your petitioner's personality behavior but the primary basis of the Civil Service Commission's affirming your petitioner's discharge was the ground

that your petitioner "continued to place material and comments into the record that were improper" (thus the term improper becomes synonymous with obscenity as a means of imposing censorship (R. 135, f. 1). At one other point in the proceedings the term "editorializing" was used as a synonym for "improper" (R. 4, f. 1), as was the term "irrelevant" (R. 4, f. 1).

(f) The issue of free speech was first raised by your petitioner, according to the administration, some six months prior to his discharge (R. 65, f. 3). The matter provided the primary basis of the initial discharge (R. 3, f. 3; R. 4, ff. 1, 2 and 3). The question was again raised and appears throughout the record of the hearing before the Civil Service Commission. It was again raised in the Petition for Certiorari before the District Court, Fourth Judicial District, State of Minnesota. (See subsection E of the petition, R. 140, f. 3; R. 141, f. 1.) The issue was again raised upon appeal to the Supreme Court of the State of Minnesota in Legal Questions 1 and 2 (page 3, Appellants' Brief). In Assignments of Error 22 (Appellants' Brief, page 13) the matter was fully argued in Appellants' Brief, pages 14 through 21. The respondents dealt with the issue of free speech at pages 45 through 50. The Supreme Court of Minnesota, however, saw fit to ignore the issue as it did several others (see Appendix B and Appendix A). The issue was again raised in your petitioner's Petition for Rehearing (see Appendix B) and was again ignored by the Minnesota Supreme Court (see Appendix C). That the Civil Service Commission of Minneapolis feels it has the power to censor is clear from their Findings (R. 134, f. 3; R. 135, f. 1) and although the issue was vigorously argued before the District Court and the Supreme Court of Minnesota, we can conclude by the simple word "affirmance" used by the District Court and the Supreme Court that that segment of the judiciary in the State

of Minnesota also believes that the power of censorship rests in the government of the State of Minnesota. ((g) not app.)

(h) In 1893 our total governmental employment (all figures include federal, state and local) can be estimated at close to one-half million with a population of 65½ million. In 1929 our population had gone up to 122 million and governmental employees up to three million. In 1940 with a national population of 132 million we had 4½ million governmental employees earning 565 million dollars. Here's the shocker! In 1962 we had 9½ million governmental employees receiving four billion dollars and our population was 186 million people (United States Dept. of Commerce, Bureau of the Census, 1963, U. S. Gov't Printing Office, pp. 709-10; see especially pp. 205-240).

Since 1893 our population has tripled while the number of government workers has increased by over 1,800%. If the families of government workers are averaged at three per family—nearly 30,000,000 people are directly supported by government employment today or 1/6 of the total population. (N.B. We do not include "private" businesses who derive their income from government contracts.) If the trend in government and population continues, in 2000 A.D. we can anticipate a total population of well over 300,000,000 with about 45,000,000 people on government payroll; assuming an average family of four at that time, we have 180,000,000 people or over half the population directly dependent upon government income.

If these figures are given the very least significance, we can still dramatically illustrate the importance of preserving responsible free speech while in government employ. For soon a majority of our citizens will of necessity (technological realities compel) look to the government for employment. If these governmental employees do not have their individual freedoms assiduously protected by the courts, an American

administrative dictatorship is inevitable and bureaucratic inefficiency will increase beyond even the wildest imaginations of the Birch Society. The freedom of a governmental employee to freely and fearlessly criticize inefficiency in his department may be the single-most important element in maintaining our democracy and a reasonable degree of productive efficiency in our governmental agencies.

Present members of this Honorable Court have clearly indicated their cognizance of the importance of applying the Bill of Rights to government employees. See *Beilan v. The Board of Education of Philadelphia* (1958), 78 S.Ct. 1317, 357 U.S. 399, 2 L.Ed.2d 1414; *Shelton v. Tucker* (1960), 81 S.Ct. 247, 364 U.S. 479, 5 L.Ed.2d 231. See especially Justice Douglas' perspicacious dissent in *Barsky v. Board of Regents* (1954), 74 S.Ct. 650, 347 U.S. 442, 98 L.Ed. 829, and some interesting state cases are collected in 163 *A.L.R.* 1351 to 1360.

It was nonetheless the economic upheaval of the 1930's that lead this Court to erect its greatest monument in this area. See *Thornhill v. Alabama* (1940), 60 S.Ct. 736, 310 U.S. 88, 84 L.Ed. 1093. The late Justice Murphy lead this Court to install free speech as a cornerstone in the institution of private employment. Perhaps the analogy to government employment is not complete because in the '60s the alimentary organ is full. But Skinner and other noted psychologists have established beyond challenge that a full stomach is not necessarily a good thing for ideals are easily exchanged for economic security. Surely the ideals of our democracy are even more important in government employment than they are in private. A clear statement by this Court of the constitutional rights of a governmental employee and the degree of governmental restraint allowable under the constitution is imperative.

Our nation can be destroyed by unrestrained bureaucracy whose power grows and spreads like jungle rot.

Your petitioner, the record clearly establishes, was not fired for "misconduct" but for his critical efficiency. He "rocked the boat" when he should have fallen into the euphoria that can only be found in job security in a governmental agency. He felt it was his duty, *AS IT IS*, to do the very best job he could. For this reason he was anathema to the sychophants. For the transgression of trying to do his job to the best of his ability, he has been burned at the stake of bureaucratic conformity.

The government employee deserves the Bill of Rights. The matter cannot be procrastinated. It may be too late already.

Wherefore, your petitioner prays that a Writ of Certiorari issue and that this case be reviewed on such Writ.

Respectfully submitted,

ROGER W. JENSON
Petitioner

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Attorney for Petitioner

APPENDIX A

No. 108 Hennepin County Rogosheske, J.

State of Minnesota ex rel. Roger W. Jenson,

39172 vs. Appellant,

Civil Service Commission of City of Minneapolis, et al.,

Respondents.

SYLLABUS

A certiorari review of proceedings conducted before a board vested with authority to discharge a municipal employee protected against arbitrary dismissal by Minn. St. 197.46 and an established civil service system is governed by rules applicable to judicial review of an administrative function. *Held,* that the proceedings resulting in relator's discharge were initiated upon a proper notice, that he was afforded a fair hearing, and that the findings upon which his discharge was based were supported by substantial evidence upon the record considered as a whole.

Affirmed.

OPINION

ROGOSHESKE, Justice.

Relator, an employee of the City of Minneapolis in the public relief division of the Board of Public Welfare, was discharged from his position as a caseworker after notice of charges and a hearing before respondent Civil Service Commission. Upon application he was furnished a transcript and afforded a review of the proceedings by certiorari in the District Court of Hennepin County. Relator appeals from its order affirming the commission's decision.

The court determined after a review of the record of the commission's hearing:

> "* * * that the evidence was sufficient to furnish a legal and substantial basis for said decision; that the said Commission's actions were reasonable and lawful and were not arbitrary, oppressive, nor unreasonable and that said Commission acted within its jurisdiction."

Relator was hired on November 23, 1959. Under the city's charter provisions[1] and the rules of its Civil Service Commission, and as an honorably discharged veteran entitled to the benefits of Minn. St. 197.46, he could not be removed from his employment except for "incompetency or misconduct" upon "stated charges, in writing" after "due notice" and a hearing before respondent commission.

On December 8, 1961, relator was given written notice by the head of his department charging him with "misconduct" and suspending him without pay pending final action by the commission upon a request for his discharge. He demanded a hearing before the commission and made two successive requests in December 1961, and January 1962 for the details claimed to constitute "misconduct." In response, the department head by two letters set forth as specific examples of the claim of misconduct that relator was insubordinate in refusing to comply with orders and suggestions of his superiors and in exhibiting an attitude toward his work, his superiors, and recipients of public relief which was described as critical and negative and which inhibited his effectiveness and impeded the conduct of public business.

After three days of hearings conducted on January 25, February 28, and March 8, at which both sides presented much testimony and a large number of exhibits, the commission on April 12, 1962, made findings approving relator's suspension and discharge. Consistent with the written charges, specific findings of fact were made to the effect

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[1]Minneapolis City Charter, c. XIX, §11.

that contrary to the instructions of his supervisors relator on specific dates and on other occasions persisted in injecting irrelevant personal comments and criticisms into official case records assigned to him for investigation and report. The commission also found that he willfully disobeyed two direct orders of his supervisors to sign his dictation and that he persistently refused to comply with departmental customs, requirements, and procedures.

The discharge of a municipal employee who is protected against arbitrary dismissal by statute or an established civil service system is an administrative function.[2] Judicial review of such proceedings by certiorari is narrowly limited in scope.[3] Where proceedings before the administrative agency vested with final authority are instituted upon a notice which reasonably details the facts claimed to constitute misconduct so that the employee is given fair opportunity to prepare and defend;[4] where the charges made are of a substantial nature directed at the malfeasance or nonfeasance of duties assigned to the employee and which specially relate to and affect the rights and interests of the public;[5] and where the employee is afforded a fair hearing,[6] the findings upon which a discharge is based are to be accepted by the court unless they are unsupported by substantial evidence on the record considered as a whole.[7] Under these rules to which we have long adhered, the administra-

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[2]State ex rel. McGinnis v. Police Civil Serv. Comm., 253 Minn. 62, 91 N.W. (2d) 154.

[3]Sellin v. City of Duluth, 248 Minn. 333, 80 N.W. (2d) 67; State ex rel. Saari v. State Civil Serv. Bd., 265 Minn. 441, 122 N.W. (2d) 174.

[4]State ex rel. Cochrane v. Peterson, 208 Minn. 361, 294 N.W. 203.

[5]State ex rel. Hart v. Common Council, 53 Minn. 238, 55 N.W. 118; Jacobsen v. Nagel, 255 Minn. 300, 96 N.W. (2d) 569.

[6]State ex rel. Ging v. Board of Education, 213 Minn. 550, 7 N.W. (2d) 544.

[7]State ex rel. Lund v. City of Bemidji, 209 Minn. 91, 295 N.W. 514; Sellin v. City of Duluth, 248 Minn. 333, 80 N.W. (2d) 67.

tive agency performs the fact-finding function. Conflicts in the testimony and the weight to be given facts and circumstances as well as the inferences reasonably to be drawn therefrom are matters to be resolved by the agency, not the courts. The strictures of this type of judicial review require that both the trial court and this court refrain from substituting their judgment concerning the inferences to be drawn from the evidence for that of the agency. Unless there is manifest injustice, this limitation applies even though it may appear that contrary inferences would be better supported or we would be inclined to reach a different result were we the triers of fact.[8]

Contrary to relator's contention, this appeal presents no novel or unusual questions. In essence, all of his 25 assignments of error simply repeat the errors asserted against the respondent before the district court. Upon the record before us, the appeal to this court amounts to no more than an exercise of relator's statutory right to have the administrative proceedings twice reviewed.

From a careful review of the printed record submitted by relator, the supplement thereto supplied by respondent, and the exhibits, we agree with the district court that the proceedings were initiated upon a proper notice sufficiently detailed and adequate in substance and that relator was accorded a fair and full hearing conducted in substantial compliance with the law governing respondent's authority. In connection with relator's contrary contention, he insists that there was unnecessary and oppressive delay in conducting the hearings and in rendering findings. Such delay as occurred appears due to the fact that the commissioners serve part time and customarily meet only two days a month.

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[8]State ex rel. Lund v. City of Bemidji, supra; Sellin v. City of Duluth, supra.

There is no suggestion that the delay was deliberate or any showing that the commission's inability or unwillingness to proceed with greater dispatch was prejudicial to relator's rights.

He further claims the court erred in sustaining his suspension pending determination of the charges. This broad challenge does not make clear whether his complaint is directed against preventing him from performing his duties or against the failure to pay his salary during this period. We find no indication in the record which raised the specific question of whether relator was entitled to be paid pending the commission's decision, and the question was not passed upon by the commission or the court below. Rule X, §10.01, of the Civil Service Rules of the city authorizes a suspension without pay for "disciplinary purposes" of not to exceed 90 days. Rule XII, §12.04(e), requires as part of the procedure for discharge that the employee be suspended without pay "until final action" by the commission. The record discloses that relator was served with separate notices of his suspension without pay. One was a suspension for disciplinary purposes under §10.01, and the other was a suspension in connection with discharge proceedings initiated under §12.04.

The latter section appears to conflict with Minn. St. 197.46 as recently construed in Johnson v. Village of Cohasset, 263 Minn. 425, 116 N.W. (2d) 692. In that case we held that in proceedings for discharge governed solely by that section of the Veterans Preference Law a veteran may not be suspended pending a determination of the charges filed against him. Respondents' Civil Service Rules are expressly made subject to §197.46 by Rule XII, §12.15. It seems clear that a suspension for disciplinary purposes as authorized by the rules, as well as a suspension with pay pending discharge proceedings, in the sense of interrupting or preventing the performance of assigned duties, does not con-

flict with the purpose of §197.46 as declared in the Johnson case. However, if relator's suspension without pay was accomplished as a part of the discharge proceedings, as it appears to have been, he would be entitled to his salary until April 16, 1962, when the commission filed its decision. Since the question of his right to pay was neither clearly asserted nor determined below, the matter is not properly before us for review. It should be noted that relator suffers no prejudice since his right to back pay is not precluded by these proceedings.

Finally, we are of the opinion that there is substantial evidence to support the findings of the commission. The testimony concerning relator's conduct was in direct conflict. There was persuasive testimony by many of his fellow employees that he was a professionally competent, dedicated worker. While some may agree that relator's difficulties stem mainly from personality and philosophical disagreements with his superiors, and thus did not warrant dismissal, such evaluation of the facts is not for this court. The record, as demonstrated by the exhibits, is replete with instances of his pertinacious refusal to follow the instructions of his superiors, to obey orders, and to conform to departmental requirements and procedures deemed important and vital to the conduct of public business, all of which the commission was at liberty to regard as misconduct justifying dismissal. Under well-established rules governing our review of the sufficiency of the evidence, we see no reason to detail the evidence which we believe supports this conclusion.[9]

Affirmed.

(Endorsed, Filed July 17, 1964. Mae Sherman, Clerk, Minnesota Supreme Court.)

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[9]Dempsey v. Meighen, 251 Minn. 562, 90 N.W. (2d) 178.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota ex rel. Roger W. Jenson,
Relator-Appellant,

vs.

Civil Service Commission of the City of Minneapolis, a Municipal Corporation, and Thomas O. Kachelmacher, Glen F. Galles, John F. Burmeister and John W. Proctor,
Respondents.

PETITION FOR REHEARING PURSUANT
TO RULE XX

Comes now the Relator, Roger W. Jenson, and respectfully petitions this court for a rehearing of the above entitled case. Said Petition is based upon three general areas:

1. The decision of this Honorable Court does not decide the crucial issue in the appeal, to-wit: Relator's constitutional right to free speech. Does government employment deprive an American citizen of his right to respectfully criticize his government? * * *

APPENDIX C

(Petition Denied)

STATE OF MINNESOTA

OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

October 1, 1964

State of Minnesota ex rel. Roger W. Jenson,

Appellant,

vs. 39172

Civil Service Commission of the City of Minneapolis, et al.,

Respondents.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN

Clerk Supreme Court

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STATE OF MINNESOTA, EX REL. ROGER W. JENSON
Petitioner

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF MINNEAPOLIS, A MUNICIPAL CORPORATION, AND THOMAS O. KACHELMACHER, GLEN F. GALLES, JOHN F. BURMEISTER AND JOHN W. PROCTOR
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
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No. 788

STATE OF MINNESOTA, EX REL. ROGER W. JENSON
Petitioner

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF MINNEAPOLIS, A MUNICIPAL CORPORATION, AND THOMAS O. KACHELMACHER, GLEN F. GALLES, JOHN F. BURMEISTER AND JOHN W. PROCTOR
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS AND CORRECTION OF INACCURACIES AND OMISSIONS IN THE STATEMENT OF FACTS BY PETITIONER

As was brought to the attention of the Court below, the record as printed by petitioner was fragmentary, replete with omissions from the settled case, edited, distorted, and modified so as to present a biased statement.

Respondents were obliged to print a supplemental record, nine copies of which have been filed herein.

The statement of facts presented to this Court in the petition for writ of certiorari (pp. 3-6) like his recital in the court below, cannot be accepted. Correction is difficult to accomplish briefly, since he states facts which are not supported by the record references he makes, and he is not candid, misrepresentation being common, which becomes the more apparent in the light of matter omitted from his record which has been supplied in respondents' supplemental record. We will first attempt to make a fair statement of the facts supported by the full record and then make necessary specific refutation or modification of recitals in petitioner's statement.

1. Respondents' statement of facts.

For at least a year prior to December 8, 1961, when he was suspended and recommended for discharge his superiors in the Division had been concerned about petitioner's work performance (R. p. 47, f. 3).

A major source of concern revolved about the "case file" which the Division establishes for each relief recipient or applicant. The purpose of this file is to have a record of the facts pertinent to each relief recipient or applicant, and the case worker is to dictate into it pertinent matter relating to the granting or withholding of relief and the expenditure of public funds (Supp. R. p. 6, f. 2; p. 10, ff. 2 & 3; and p. 11, f. 3). After interview or investigation the case worker dictates the matter into a machine and a Division transcription operator will type it up and return it to the case worker along with the file for him to check the latest recorded entry for accuracy and then authenticate it

by appending his signature to the entries (Supp. R. p. 6, f. 2).

After becoming concerned about his work, including deficiencies in his dictation consisting of his injection into a relief recipient's file of extraneous comment, grievances of various kinds, and opinion irrelevant to the file and the purposes for which it was set up, the administrative officers of the Division proceeded to observe his day to day work by having the transcription operator make copies of his dictation for their inspection. This was an entirely proper exercise of supervisory direction of the work of the Relief Department so that it could review and evaluate the work of this relator, as it had done of others, it being a common procedure for supervisory personnel to review a case worker's work by reading his dictation (Supp. R. p. 11, ff. 1-3; p. 12, f. 1; p. 16, ff. 2 & 3; p. 17, ff. 2 & 3; and R. p. 47, f. 2; p. 48, f. 2) and it was consistent with good administration and supervision (Supp. R. p. 11, ff. 1 & 2).

On numerous occasions one or another of his superiors counseled with him and discussed the improprieties which they saw in his work. Witness Olson was "tremendously concerned about the whole area of his performance" (R. p. 53, f. 2); complaint procedure was explained to him (Supp. R. p. 21, f. 1); as was grievance procedure and channels (R. p. 50, f. 1). Unit Supervisor Gooley told him to put pertinent information into case records and if he continued not to do so, he would recommend disciplinary action (R. p. 62, f. 2). Various superiors tried to direct and counsel with him on various occasions including early February, 1961 (R. p. 51, ff. 1-3); March 15, 1961 (R. p. 53, ff. 2 & 3; and R. p. 54, f. 1); the first part of April, 1961 (R. p. 66, f. 3) May, 1961 (R. p. 54, f. 3; p. 55, f. 1); June

8, 1961 (R. p. 65, ff. 2 & 3; and p. 66, ff. 1 & 2); March 30, 1961 (R. p. 47, ff. 1 & 2); July 19, 1961 (R. p. 60, f. 2); October 30, 1961 (R. p. 62, f. 3); December 7, 1961 (R. p. 122, f. 3). The supplemental record discloses that he was also counseled on June 1, 1961 (Supp. R. p. 12, f. 1; and p. 18, ff. 2 & 3; p. 19, f. 1) (see also Supp. R. p. 17, ff. 2 & 3).

For all the counselling he did not change (Supp. R. p. 18, ff. 2 & 3).

When Department witness Olson was asked what he meant when he was critical of petitioner's dictation as being "editorializing" he said "I also probably used a number of other adjectives in describing the problem that I saw in his case recording, and these other adjectives would relate to what I would call lack of objectivity in his case recording" (Supp. R. p. 15, ff. 2 & 3). Examples of this type of work were read into the record as excerpted from seven case files (R. p. 14, f. 2-p. 17, f. 3; Supp. R. p. 12, ff. 2 & 3) and (R. p. 22-p. 23, f. 1).

By far the great bulk of objectionable dictation by relator was placed in the record by the department in the form of exhibits, and only the earliest examples in point of time were read into the record. The rest are found in Exhibit D consisting of 50 excerpts from case files, being further examples of objectionable dictation (R. p. 24, f. 2); Exhibit E, printed as Appendix II to the Supplemental Record herein (Supp. R. p. 29); and Exhibit F, consisting of six more objectionable case file entries (R. p. 25, f. 2).

Other activity considered to be improper on his part included his improper preparation of daily report sheets, Exhibits A and B (Supp. R. p. 6, f. 3; p. 7, f. 1); a letter which did not follow established channels and grievance

procedure (Supp. R. p. 7, f. 3-p. 9, f. 3); his use of IBM forms designed for statistical purposes as a vehicle for jokes (Supp. R. p. 15, ff. 1 & 2; R. p. 26, f. 3-p. 30, f. 2; Supp. R. p. 24, ff. 1 & 2).

In addition he impeded public business (Supp. R. p. 20, f. 1) in matters related to pay, sick and military leave (Supp. R. p. 19, ff. 1 & 2) retirement and paychecks (Supp. R. p. 17, f. 3, and p. 18, f. 1) and deliberately dressed poorly as a protest (R. p. 62, f. 3; p. 63, f. 1).

He testified that his purpose was to reach the Administration with his grievances through the medium of the case file (R. p. 127, f. 1) and was so reaching them through their receiving copies of his work, but he inconsistently protested to the transcription operator that she was violating a law by making such copies (R. p. 10, ff. 1 & 2).

Then, early in November, 1961, he informed the operator that in all cases where a copy was being made the entry should show "CC:D.P.R. Administration" in every case (R. p. 9, f. 2). It was improper for him to insist on this (Supp. R. p. 11, f. 3; R. p. 9, f. 2; p. 49, f. 3; p. 50, f. 1), and for him to refuse to sign if the clause wasn't transcribed (Supp. R. p. 10, f. 2). Signing is a "must" (Supp. R. p. 10, ff. 2 & 3).

On the morning of December 7, 1961, Director Olson told petitioner it was absolutely necessary that he sign his dictation; petitioner admitted he would have time enough to do so on that day but said: "I am not sure I am going to sign it" (R. p. 11, f. 2). Superintendent Jensen ordered relator to sign his dictation either at the close of the day on December 7th or in the morning of December 8, 1961 (R. p. 122, f. 3; p. 11, f. 2) and told him not to carry on any other activity but to do exclusively the signing of dictation

(R. p. 12. f. 1). He was ordered to sign by Unit Supervisor Gooley (Supp. R. p. 26, f. 3).

On direct examination by his counsel, referring to the morning conference on December 7, 1961, petitioner stated: "I remember Mr. Olson making a statement 'Are you going to take care of signing dictation?' and I said, 'Is the superintendent still going to give (sic—get?) blind carbons?' and Mr. Olson said: 'Yes', and I said 'Let's bring that to a head.' " (R. p. 123, f. 2).

The violation of direct orders to sign his dictation (Supp. R. p. 21, f. 2) immediately preceded his suspension and recommendation for discharge.

It is quite clear that petitioner well understood that it was the desire of his superiors and their direction that he take care of the signing of his dictation on December 7th and 8th, 1961 (R. p. 123, ff. 1-3). Relator stated as to his daily sheet for December 8, 1961 (Exhibit 6; R. p. 122, f. 1) that his dictation on that day probably accounted for the 45 cases that were left on his desk unsigned at the close of business on December 8, 1961. However, the list of these cases shows 29 of the 45 files left on his desk for signature had been transcribed and left there from November 20 to 28, 1961 (Supp. R. p. 11, f. 1).

A few miscellaneous statement of facts and references should be made:

"Day sheets", "Daily report sheets" are explained (Supp. R. p. 6, f. 3; p. 7, f. 1). Petitioner's letter of November 18, 1961 was written improperly, failing to follow established grievance procedures (R. p. 9, f. 1; Supp. R. p. 7, ff. 2 & 3; letter itself is Supp. R. p. 7, f. 3-p. 10, f. 2). The importance of determination of "settlement" is explained as bearing on the question of which political subdivision must pay for relief given but relator stated in a case file: "Settlement; who knows and who cares?" (Supp. R. p. 12, f. 3).

2. Specific corrections in petitioner's statement.

a. The record is not overwhelmingly clear that petitioner was an outstanding social worker (Petition p. 4). The record references given to certain fellow workers' opinions as to his competence should be evaluated as to foundation, weight and sufficiency, and also as to what they actually did testify to, since each had but a very limited opportunity to observe and judge his performance, as appears largely by testimony omitted from relator's record (Supp. R. p. 22, ff. 1-3; p. 22, ff. 2 & 3; p. 23, ff. 1 & 2; p. 24, f. 3; p. 25, ff. 1-3; and p. 25, f. 3; p. 26, f. 1). The succeeding statement is not supported by the cited record references and there is no justification for the inferences and statements in relator's statement of facts that administration witnesses generally agreed or admitted that he was either competent, the best case worker, an excellent case worker, or a perfect one (R. p. 39, f. 3; p. 73, f. 3; p. 75, f. 2; Supp. R. p. 21, f. 3; p. 22, f. 1; R. p. 46, f. 2).

b. He was not fired for exercising any recognizable right to free speech and this was not openly admitted as a cause by the "key witness" (Petition p. 4). The statement by petitioner is not supported by his record references.

c. The statement regarding truth in petitioner's reporting is unsupported by petitioner's references (Petition p. 4) (see also R. p. 43, f. 3).

d. The statement "Not one word was deleted from your petitioner's case reporting although any one of at least five or six levels above him had the authority to change it" (Petition p. 4), is completely unsupported by the record references and, in fact, as to the authority to change or alter the report or case entry, the record is completely to the contrary (R. p. 58, ff. 2 & 3).

e. A question of free speech was asserted by petitioner in his defense at various stages in the proceedings by him alone, but the statement "The matter provided the primary basis of the initial discharge" (Petition p. 5), is not supported by petitioner's record references or any other parts of the record.

f. The statement "The respondents dealt with the issue of free speech at pages 45 through 50" (Petition p. 5), is true only to the extent that respondent devoted those pages to a refutation of petitioner's claim that a constitutional issue of free speech was somehow involved and distinguishing each of the cases upon which he relied below: *Wieman v. Updegraff* (1952), 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 215; *Stockhower v. Board of Higher Education* (1956), 350 U.S. 55, 76 S. Ct. 637, 100 L. Ed. 692; and *Roth v. U.S.*, 354 U.S. 496, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (none of which he now cites in this petition).

g. From its opinion it is clear that the Minnesota Supreme Court did not take the free speech claim seriously in its findings of the adequacy of the grounds for discharge for misconduct and it also indicated its reaction to petitioner's claim that freedom of speech was involved, which he had asserted at item 22 in his assignment of error in his brief to that Court, when it said:

> "Contrary to relator's contention, this appeal presents no novel or unusual questions. In essence, all of his 25 assignments of error simply repeat the errors asserted against the respondent before the district court. Upon the record before us, the appeal to this court amounts to no more than an exercise of relator's statutory right to have the administrative proceedings twice reviewed."

ARGUMENT

1. Petitioner's Constitutional Guarantees of Freedom of Speech Were Not Impaired or Involved, and There is No Substantial Federal Question Upon Which a Jurisdiction Can Here Be Invoked.

Petitioner makes the claim that his constitutional rights have been violated insofar as his superiors in the Division of Public Relief have attempted to interfere with his freedom of speech. It does not appear from the record that there has been any attempt to interfere with his rights to freely express himself, either on or off the job, with the single exception that he was counseled and instructed not to dictate into case files and other official records his general views, criticisms of his superiors and the officers of the city, county and state government, his adverse opinions of the character of relief clients, grievances against the system in general, or anything else irrelevant to the subject matter of an individual relief recipient's file and need or lack of need for public assistance (R. p. 65, ff. 2 & 3; p. 57, ff. 2 & 3). The Division of Public Welfare neither has, nor had any obligation to provide relator, or anyone else, with a forum in which he may freely express his opinions. The public and the city have a right to demand that while he is engaged in performing public business for which he is paid a salary, that he shall do so within the framework of the rules and policies of the department and the city, subject to the lawful orders, instructions and directions of his superiors.

No case can be found by respondent wherein the court considered a question of constitutional guarantees of free speech in connection with the asserted right of a private or

public employee that he may write into official files and internal records of the business anything he wishes, heedless of direction by administrative superiors. Petitioner has not cited any such case supporting his position that freedom of speech under the 1st or 14th Amendments to the U.S. Constitution is at a) involved in such a situation.

In pretended s' port of his claim that somewhere involved here is an issue of freedom of speech petitioner now cites four cases on page 7 of his petition. However, he does not in any way relate or explain what, if any, pertinency these cases have in relationship to his case, other than his representation that your Court is cognizant of the importance of the Bill of Rights and the importance of freedom of speech guaranteed thereby. These cases when read are found to militate against rather than support his contention that there is involved here a constitutional issue of free speech.

Petitioner also cites on page 7 of his petition *163 A.L.R.* 1531 to 1560. In this annotation it is clearly demonstrated that the courts have not considered that free speech considerations apply to matters within the actual performance of the duties of their office which are, as we have seen, the only type of matters which were under consideration in the present case. In that annotation entitled "Governmental control of activity or speech of public officers or employees in respect of matters outside the actual performance of their duties", the following general statement is made:

> "The courts have had occasion in numerous instances, to pass upon the validity of legislative provisions and administrative rules or regulations upon the actions or speech of public officers or employees in respect of matters outside the actual performance of their duties. Such provisions and regulations have

frequently been challenged upon the ground that they constitute an unwarranted encroachment upon the domain of individual liberty within the protection of constitutional guarantees. The cases dealing with the question are generally to the effect that the governing authority may impose such restriction in so far as they are designed to secure the proper administration of the office or department, or to protect or promote the public interest in other respects and have a reasonable relation to such purpose, although particular provisions, regulations or orders have in some instances been held invalid for various reasons and in respect of some matters there is some conflict of opinion.

"Decisions upholding such restrictions have frequently been predicated upon the theory that the governmental authority, in creating a public office or providing for public employment, may attach such conditions as it chooses, and that one who accepts such office or employment is bound by the conditions attached thereto so long as he continues therein and to that extent surrenders or waives such rights and privileges as he might otherwise be entitled to exercise. The doctrine, in other words, is that one may and must choose between the privilege of holding the office or engaging in the employment in question and the privilege of exercising the constitutional rights involved in the attached conditions or restrictions."

As in *State ex rel. Curtis v. Steinkellner* (1945), 247 Wisc. 1, 18 N. W. 2d 355, there was here an established grievance or complaint procedure which employee knew about and did not follow. The Court said:

"Considered as a whole, the rules simply require that complaints must come through the regular channels— It seems to us entirely reasonable that so long as there

> are outlets for complaints the discipline of the department be maintained by avoiding public controversies between the subordinates of the department and their chief. Any other rule would tend to destroy the discipline of the department and it seems to us that regardless of the rule prohibiting giving information outside the department the indulgence in public criticism such as is involved here in advance of any attempt to have the grievances settled within the department is an act of insubordination and is subversive of discipline. The foregoing conclusions are enough to decide this case and we see no reason to speculate on extreme situations which might with more force be argued to interfere with the constitutional right of free speech."

The administrative officials of this public agency instructed and directed petitioner, a subordinate employee, as to what, and the character of, information it wanted him to record in confidential, internal files and records, which in the normal course would not be seen outside of the agency (in spite of the contrary inference of petitioner) (R. p. 49, f. 1). No court decision ruling on this rather obvious elementary right of the agency has been found. It must be observed, however, that there are cases which go far beyond such a situation in placing limitations upon public employees' rights of free speech.

In the case of *United Public Workers of America (C.I.O), et al. v. Mitchell, et al.*, 330 U.S. 75, 102, 67 S. Ct. 556, 571, 91 L. Ed. 754, 774, in construing the "Hatch Act", the Court said:

> "* * * Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of

> the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions."

and at page 95 (S. Ct. 567, L. Ed. 770):

> "The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."

At page 103 (S. Ct. 571, L. Ed. 774), the Court said:

> "When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required."

Adler v. Board of Education of the City of N.Y. (1951), 342 U.S. 485, 492, 72 S. Ct. 380, 384, 96 L. Ed. 517, 524, involved the Civil Service Law of New York, making ineligible for employment in any public school any member of any organization advocating the overthrow of the government by force, violence or any unlawful means. It was held constitutional. The Court said:

> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. Communications Assn. v. Douds, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. Has

> the State thus deprived them of any right to free speech or assembly? We think not * * *."

The question was well summed up early when in 1891 Mr. Justice, then Judge Holmes, said in *McAuliff v. New Bedford*, 155 Mass. 216, 220, 29 N. E. 517:

> "There is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule (against soliciting money or aid for a political purpose) as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

2. Even If a Federal Question Were Involved and Had Been Properly Raised the State Court Judgment Was Based Upon an Adequate and Independent Non-Federal Ground.

Your Court will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided. *Murdock v. Memphis*, 20 Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. As was stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-6:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgment, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

The Supreme Court of Minnesota obviously was not persuaded that there was any basis for seriously considering the freedom of speech protestations of petitioner as is clear from its opinion and its denial of the petition for rehearing.

The Court upheld the dismissal of this employee for "misconduct" pursuant to the provisions of *Minnesota Statutes* 197.46 (the "veterans preference act"). The Court said:

> "Consistent with the written charges, specific findings of fact were made to the effect that contrary to the instructions of his supervisors relator on specific dates and on other occasions persisted in injecting irrelevant personal comments and criticisms into official case records assigned to him for investigation and report. The commission also found that he willfully disobeyed two direct orders of his superiors to sign his dictation and that he persistently refused to comply with departmental customs, requirements, and procedures."

The Court also said:

> "From a careful review of the printed record submitted by relator, the supplement thereto supplied by respondent, and the exhibits, we agree with the district court that the proceedings were initiated upon a proper notice sufficiently detailed and adequate in substance and that relator was accorded a fair and full hearing conducted in substantial compliance with the law governing respondent's authority."

(In passing, it should be noted that the bulk of the evidence bearing upon petitioner's misconduct as found by the commission, the District Court, and the Supreme Court of Minnesota is to be found in the numerous exhibits introduced which it is believed are not before your Court at this time.)

The Court also said:

> "The record, as demonstrated by the exhibits, is replete with instances of his pertinacious refusal to follow the instructions of his superiors, to obey orders, and to conform to departmental requirements and procedures deemed important and vital to the conduct of public business, all of which the commission was at liberty to regard as misconduct justifying dismissal."

Thus, on the face of the decision of the Minnesota Supreme Court it is apparent that it found ample bases for its decision on adequate and independent nonfederal grounds, obviating review by your Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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